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The State of Utah v. Manuel Dominguez Juarez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. MANUEL DOMINGUEZ JUAREZ, Defendant / Appellant	)	**BRIEF OF APPELLANT** Case No.981855-CA Priority no. 2

Appeal from final Order of Judgment and Sentence for one count of possession of a controlled substance with intent to distribute, Marijuana, a Third Degree Felony, in the Sixth Judicial District Court in and for Kane County, State of Utah, the Honorable K. L. McIFF, Judge, presiding. For a review of that Court's Order Denying Motion to Suppress.

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JURISDICTIONAL STATEMENT

Jurisdiction to hear this appeal is conferred upon the above-entitled Court by Section 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW (PRESERVATION OF APPEAL ON THE RECORD)

This is an appeal from a conditional plea of guilty to said third degree felony to allow the Appellant to challenge the Court's denial of Appellant's Motion to Suppress.

1. The Kane County Deputy Sheriff, Dan Watson, without the reasonable suspicion or requisite probable cause, unlawfully seized, detained, and searched the Defendant's vehicle, after his initial reasons for the stop (speeding) had been concluded or abandoned. Apparently, Deputy Watson never started to write a citation for speeding. *Preserved for appeal at* (R. 74-75).

Conclusions of law in criminal cases are reviewed for correctness. *State v. Thurman* 846 P.2d 1256 (Utah 1993). *State v, Brown*, 852 P.2d 851 (Utah 1992). Supporting authorities are: *State v. Lopez*, 873 P.2d 1127 (Utah 1994), and *Terry v Ohio*, 392 U.S. 1,27, 88 S. Ct. 1868, 1883, 20 L.Ed.2d (1968).

2. When Deputy Watson, operating alone, left his truck radio unattended, and removed his dog from the truck, he purposefully stopped forward progress on the stated reason and purpose for the initial stop, thereby abandoning same. According to Deputy Watson, he performed the same ritual on three fourths (3/4) of the dozen, or so, stops he made daily in his capacity as patrol deputy. The Deputy had absolutely no grounds for suspicion of anything, other than speeding, when he

started his search of Appellant's pickup. *Preserved for appeal at* (R. 156 p. 67 ll. 19-22).

Conclusions of law are reviewed for correctness. *Thurman, supra.* Supporting authorities are: *State v. Schlosser*, 774 P.2d 1132 (Utah 1989), *State v. Mendoza*, 748 P.2d 181, 183 (Utah 1987), and *United States v. Hensley*, 469 U.S. 221, 83 L.Ed.2d 604 (1985).

3. Without probable cause, without a search warrant, without any factors being present to constitute any recognized exception to the warrant requirement, Deputy Watson failed to ask for, or obtain, consent of any of the occupants of Appellant's truck prior to searching the same. Preserved for appeal at (R. 71).

Conclusions of law are reviewed for correctness. *Thurman, supra.* Supporting authorities are: *State v. Schlosser*, 774 P.2d 1132 (Utah 1989). *State v Mendoza,* 748 P.2d 181,183 (Utah 1987), and *United States v Hensley*, 469 U.S. 221, 83 L. Ed 2d 604 (1985).

4. The Deputy's stated reason for taking his Narcotics Detector Dog, Rudy, to the driver's door of the Appellant's pickup, while the Appellant, his two adult passengers, and the infant child, were still seated inside, was to announce his intention to walk his dog around the truck and to inform the occupants of the truck not to dismount the vehicle. This action amounted to "seizing" the truck and it's occupants for his non-consensual investigative purposes. *Preserved for appeal at* (R. 156 p. 115). Deputy Watson had no articulable, reasonable, suspicion or probable cause, and he did not ask for consent or receive valid, voluntary,

permission to do a search of the vehicle, nor did he request or obtain a warrant at any time during the stop, or the subsequent trip to the Kane County Sheriffs Office, where the bed of the truck was completely dismantled. The Deputy had not arrested anyone when he first searched the pickup and found the physical evidence. *Preserved for appeal at* (R. 9) Conclusions of law are reviewed for correctness. *Thurman, supra.* Supporting authorities are: *State v. Schlosser*, 774 P.2d 1132 (Utah 1989). *State v Mendoza,* 748 P.2d 181,183 (Utah 1987), and *United States v Hensley*, 469 U.S. 221, 83 L. Ed 2d 604 (1985).

5. Damaris Juarez, the Appellant's adult daughter, told Deputy Watson that the Appellant did not speak English when the Deputy first asked to see their papers. Deputy Watson did not speak Spanish. There is circumstantial evidence, and direct testimony, that supports the Appellant's contention that the confessions were obtained through coercive police interrogation techniques, and language designed to manipulate, dominate, and nullify Defendant's free and unconstrained choice. Deputy Watson threatened to incarcerate Defendant Juarez's daughter when there was absolutely no evidence that she possessed any knowledge of the marijuana.

He threatened to remove Defendant's infant grandchild to foster care. Deputy Watson's threats, combined with the act of actually removing the infant from the mother, coerced Defendant Juarez to make a confession, when he had adamantly denied any knowledge, or involvement, in criminal activity prior to that time.

The State has failed to prove, by a preponderance of the evidence, that statements, admissions, and/or confessions, made by Appellant, were obtained in

accordance with principles espoused in *Miranda,* and that the Appellant voluntarily, knowingly, and intelligently waived his *Miranda* rights. There is circumstantial evidence, and direct testimony, that indicates the confession was obtained through coercion and Appellant's ignorance of his fundamental rights. The Appellant could not speak or understand English. The translation by Trooper Davis, as the interpreter, is problematic. During his interrogation, Appellant raised a question regarding the purpose of a lawyer; after that, no officer told Appellant that he had the right to remain silent and the right to have an attorney present during questioning. The State has produced no evidence, other that the statement of the interrogating officers, that Appellant understood and waived the rights afforded him under *Miranda*, the Fifth Amendment, and the Due Process Clause of the U.S. Constitution, and the Constitution of the State of Utah. In spite of the fact that they had recording equipment available to them at all times, it was never used until the defendant started telling them what they wanted to hear. *Preserved for appeal at* (R. 67). Conclusions of law are reviewed for correctness. *Thurman, supra*. Supporting authorities are: *State v. Schlosser*, 774 P.2d 1132 (Utah 1989). *State v Mendoza,* 748 P.2d 181,183 (Utah 1987) and *United States v Hensley*, 469 U.S. 221, 83 L. Ed 2d 604 (1985).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a final order of Judgment and Sentence for one count of possession of a controlled substance with intent to distribute, Marijuana, a Third

Degree Felony. This conviction is based upon Appellant's conditional plea of guilty to said charge to enable him to appeal the Trial Court's denial of his motion to suppress.

At the suppression hearing, counsel for the parties stipulated that the transcript of the preliminary hearing should be made a part of the record and considered by the Court as evidence on the suppression issues. The Court accepted the stipulation. (R. 130, p. 11) (R. 158, p. 4).

STATUTES AND CONSTITUTIONAL PROVISIONS

The controlling statutes and constitutional provisions are found in the Addendum.

STATEMENT OF FACTS

On April 20, 1996, approximately 8:00 P.M., DEPUTY, DANIEL LEWIS WATSON, at that time a patrol deputy for the Kane County, Utah, Sheriff's Office, traveling eastbound, activated his forward radar gun and stopped a pickup truck westbound on highway 89, about milepost 62, for driving 68 mph, thereby exceeding the posted speed limit of 55 mph. Defendant, MANUEL DOMINGUEZ JUAREZ, was driving, ANGEL DOMINGUEZ RASCON, was a passenger, and Defendant Juarez's eighteen year old daughter, DAMARIS JUAREZ, and her two year old child, also occupied the single seat vehicle. (R. 156 p. 12-15) (R. 158, p. 13, ll. 3-25, p. 14, ll. 1-8). The Defendant driver and his male passenger, could not speak or understand English. The Defendant's daughter was the only person at the initial stop who was bilingual. The Defendant's daughter was pressed in to service,

at times, as the language interpreter during the initial stop. (R. 156 p. 15 L 9-15) (R. 158, p. 20, ll. 19-24). Deputy Watson obtained the license of the driver and the registration for the vehicle (R. 156 p. 16 ll. 11-24) (R. 158, p. 14, ll. 9-16) and demanded identification from the Defendant's daughter and his passenger, Mr. Rascon. (R. 156 p. 16 ll. 11-17). When the Defendant's daughter asked why he needed her identification Deputy Watson stated, if she was going translate / interpret for him, he needed to know who he was doing business with. (R. 156 p. 16 ll. 11-15) Deputy Watson's examination of the identification papers found them satisfactory, but then, returned to his radio-equipped vehicle to run a check with his radio dispatcher. Instead of remaining on purpose by completing his communication with the dispatcher, (R.156 p. 16 ll. 21-24) Deputy Watson, without any reasonable articulable suspicion of criminal activity, (R. 156 p. 17 ll. 9-12), elected to take his dog, RUDY, (R. 156 17 ll. 12-25, p. 18 ll. 1-19), a certified Narcotics Detector Dog, from the patrol truck he was driving. (R. 156 p. 16 ll. 21-24). He testified that he had no particular reason to take the dog from the vehicle at that time. (R. 156 p. 17 ll. 9-12). He then took the dog to the driver's side door of the Defendant's vehicle. (R. 156 p. 17 ll. 13-15, ll. 19-24) (R 158 p. 60 ll. 19). Deputy Watson did not ask permission to search the vehicle or for permission to have the dog check the vehicle. (R. 156 p. 17 l. 25, p 18 ll. 1-6) (R 158 p. 60 ll.21-22). Standing at the driver's door with the dog, Deputy Watson instructed the occupants to remain in the vehicle and to <u>roll up their windows and turn their vent on high</u>. (emphasis added) (R. 158 p. 60 ll. 23-24).

Q. What happened next?

A. I started on the driver's front side by the bumper and I gave Rudy her search command and walked her around along the driver's side of the vehicle to the tailgate and along the back of the tailgate."(R. 156 p. 18 ll. 7 – 11) (R 158 p.60 ll. 25, p. 61, ll. 1 – 3) (emphasis added)

According to Deputy Watson, the dog indicated reactions only on the seam of the right side [passengers side] of the tailgate, of the pickup bed. (R. 156 p. 18 ll. 20-24) (R. 158 p. 61 ll. 3 – 5).

Q. "... what is Rudy's reaction when she indicates on something?

A. Rudy is an aggressive indicator. She will scratch, bite, or bark at the - - at the source of the odor that she detects." (emphasis added) (R. 156 p. 18 ll. 15-19).

We have two different scenarios from Deputy Watson's testimony about how, and when, he caged the Narcotics Detector Dog, Rudy, following the dog's reaction on the right rear seam of the tailgate of the Defendant's pickup. First Deputy Watson states he returned the dog to the security of his police vehicle before going to the Defendant and asking him to step out of his truck. (R. 156 p. 19 ll. 3-10). During cross examination, in response to a question as to whether or not the Narcotics Detector Dog, Rudy, had ever been up in the bed of the Defendant's pickup truck, Deputy Watson responds that the Detector Dog jumped into the bed of the defendant's pickup, when the Defendant dropped the tailgate, during an

interrogation of the Defendant at the back of the pickup. Deputy Watson also states that the dog gave no indication of the presence of narcotics while the dog was in the bed of the pickup. (R. 156 p. 52 ll. 21-25, p. 53 ll. 1-15).

Following the stated indication at the seam of the tailgate, in English, Deputy Watson asked the driver, who could not speak or understand English, to get out of the vehicle,(R. 158 p.61, ll. 6 – 7) and took him out of earshot of the daughter who could speak and understand English (R. 156 p. 19 ll. 9-25). Deputy Watson asked the defendant why the dog was indicating on his truck. In response, according to the Deputy, he received a blank stare that caused him to realize that the Defendant truly did not speak English (R. 156 p.19 ll. 25, p.20 ll. 1-2). Attempting to obey Deputy Watson's demanding demeanor, the Defendant opened the tailgate and pulled a suitcase to the back of the tailgate. (R. 156 p. 20 ll. 4-8).(R 158 p. 57, ll. 19 – 23). It was at that time, Deputy Watson claims that he noticed that double stick tape was used to hold the bed-liner to the bed of **the** pickup and the left rear corner of the driver's side of the bed-liner had separated from the tape (R. 156 p. 20 ll. 15-24) approximately one-half inch to one inch. (R. 9 para 4 ll. 3). Without asking the Defendant's consent (R. 156 p. 20 ll. 25, p. 21 ll. 1-2), the Deputy pulled that left-hand corner end of the liner, at the rear of the vehicle, further away from the pickup bed, after engaging a flashlight which, enabled him to see into the space between the liner and the pickup. (R. 156 p.21 ll. 3-13 p. 23, ll. 1-5). Although it was still daylight at this time, apparently, the

Deputy needed a flashlight to see down the side of the truck between the bed-liner and the pickup bed, where he observed packages which, appeared to be wrapped in tape and stowed forward three to four feet (R. 156 p.21, ll. 17-22 p. 101 ll. 5-13) toward the cab of the truck. (R. 156 p. 21 ll. 20-22). According to Deputy Watson, who says he speaks very little Spanish, (R. 156 p. 23 ll. 13-14) he had the Defendant, who was still unaccompanied by an interpreter, (R. 156 p. 23 ll. 10-12), look inside the bed-liner at the packages and, at that time, the defendant threw up his hands and stated, in broken English, what sounded to Deputy Watson like (R. 156 p. 23, ll. 19-20), "It's not my truck." (R. 156 p. 23 ll. 8-21). The Deputy then called for backup, examined the liner on the passenger side and observed similar types of packages. (R. 156 p. 23 ll. 23-25 p.24 ll. 1-9). Trooper John Davis, who spoke Spanish, arrived at the scene and placed Defendant Juarez in the back of his vehicle and both officers removed Mr. Rascon from the passenger side of the vehicle and handcuffed him. (R. 156 p. 24 ll. 10B25 p. 25 ll. 1-2) They then removed Ms. Juarez and infant from the vehicle, handcuffed her, and placed her under arrest. (R. 156 p. 25 ll. 3-12). Chief Deputy Allen Johnson also arrived at the scene and all the three adults, the baby and the truck were taken to the Kane County jail. (R. 156 p. 25 ll. 13-25 p. 26 ll. 1-17). In the jail parking lot, the bed-liner was removed exposing 31 packages weighing a total of 67.31 pounds that a later analysis determined to contain marijuana. (R. 156 p. 28 ll. 10-14, p. 47 ll. 4-25, p. 48, p. 49 ll. 1-21).

At the Sheriff's Office, each of the suspects were interviewed separately on at least two different occasions in the presence of the three officers; Deputy Watson, Utah Highway Patrol Trooper, John Davis and Kane County Sheriff's Chief Deputy, Allen Johnson. (R.156 p. 29 ll. 16-19). Trooper Davis, who admits his Spanish fluency is less that one hundred percent, (R. 156 p.76 ll. 3-6), translated during the interrogation of the Spanish-speaking suspects. (R. 156 p. 33, 36 p. 76 ll. 12-17) The Appellant, and each of his passengers, was first given the *Miranda* warning after Trooper Davis arrived at the scene of the stop. (R. 156 p. 24 ll. 11-25, p. 25 ll. 1-2). They were given a second Miranda warning at the Sheriff's Office and denied any knowledge of the existence of any drugs. (R. 156 p. 30, p. 31 ll. 1-23, p. 32, 36). After the completion of the first set of interrogations, a re-interview of each of the parties began and the question and answer process was repeated. (R. 156 pp. 37, 41, 44). Ms. Juarez again denied any knowledge of the circumstances surrounding the drugs. (R. 156 p. 38 ll. 21-24). During the second interview of Mr. Juarez, the Appellant, continued to deny any knowledge regarding the marijuana. Deputy Watson advised the Appellant that if Ms. Juarez were arrested, her baby, his grandchild, would be taken from her and would be placed in foster care. (R. 156 p. 61 ll. 25, p. 62 ll. 1-3 p. 86-87, p. 97 ll. 14-25 p. 98 ll. 1-18, 112-113). Deputy Watson then left the interrogation room, accosted Ms. Juarez, telling her, that because of her father's refusal to cooperate, her baby would be taken from her and placed with a foster family and she would be booked, arrested and held. Then and there, her baby was taken from her by Deputy Watson

and carried to the open door of the interrogation room (R. 156 p. 62 ll. 16-25 p. 63 ll. 1-6) and then past the open door of the interrogation room (R. 156 p. 62 ll. 16-25 p. 63 11. 6) to the dispatching area. (R. 156 p. 41 ll. 21-25 P 42 l. 1). Deputy Watson then returned to the interview room without the Appellant's grandchild. Trooper Davis advised Deputy Watson that Defendant Juarez had now agreed to take the blame. (R. 156 p. 42 ll. 2-8). The Appellant then, in a question and answer interrogation by Trooper Davis in Trooper Davis' Spanish, acknowledged involvement in transporting the Marijuana and this statement was recorded. (R. 156 pp. 40,42-44, 63 ll. 2-6, pp. 86-88, 100, 101, p. 32 ll. 22-25 p. 33 ll. 1). No other conversations were recorded that evening, not the Miranda warnings and not even the first part of the Appellant's conversation when he confessed. From the testimony of Deputy Johnson as to the position of the Appellant in the interrogation room, the Appellant could have observed Deputy Watson with the child after the removal of the child from the mother. (R. 156 p. 114 ll. 2-7). During the second interview of Mr. Juarez, he asked the interrogating Officers what was the purpose of a lawyer. (R. 156 p. 101 ll. 14-18, 22-24). Trooper Davis testified he told Mr. Juarez, (R. 156 p. 102 ll. 7-10) ". . . lawyers legal counsel explain to you your rights, what the laws are, and what basically what you need, can and can't do, need to do, as far as the whole situation goes." (R. 156 p. 102 L. 4-10). After that, Trooper Davis states, it was quiet for a little while, as Deputy Watson was out of the room on his errand and finally, according to Trooper Davis, the Defendant said Listen, I'll go and come clean with you. Or according to Trooper Davis, "Okay. I'll

take the blame for it." (R. 156 p.99 ll. 24-25 p. 100, ll. 1-5).

Soon thereafter, Damaris Juarez and her baby were released from jail and she was not booked, nor was she charged with any crime. (R. 110 para 28 and 31) (R. 157 p 8 ll. 5-7)(R. 158, p. 69 ll. 18 – 22)

Q. " I trust that you or someone made a decision not to file charges against Mz. Juarez, correct?

A. That's correct.

Q. Who made that decision, and why?

A. I did, based on the fact that um, her father confirmed that she didn't know anything about the packages." (R. 156 p. 32 ll. 4-9).

The recorded confession, (R. 156 p. 39 ll. 17-25, p. 40) was transcribed by the prosecution and in the end notes of the official transcriber he complains about the lack of the Troopers understanding of, certain Spanish verbs, subject pronouns, and how the person asking the questions doesn't understand the rather basic conjugation of the verb "poner". (R. 65 para 3).

SUMMARY OF ARGUMENTS

Point I: In this case, using the opportunity of a routine traffic violation to initiate a search of Defendant's pickup with the aid of a drug dog, with absolutely no prerequisite probable cause, as Deputy Watson does on seventy five percent of the travelers that this officer contacts, (R. 156 p. 67 ll. 19-22) flies in the face of the Fourth Amendment to the United States Constitution and the Constitution of

the State of Utah.

See *Boyd v. United States*, 116 U. S. 616, 633 (1886) as follows:

> "For the `unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man `in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an `unreasonable search and seizure' within the meaning of the Fourth Amendment."

Also, see *U.S. v. Vertigo-Arcades*, 494 U. S. 159, 265 (1990).

Point II: Extending the time of a traffic stop to do a dog search of a vehicle has been upheld in other jurisdictions, but, in those cases, they had, reasonable articulable suspicion, or requisite probable cause or two officers, one working the traffic stop and the second handling the dog. The two-man operation satisfied the requirement, in those jurisdictions, of not extending the time required for the primary reason for the stop. *See State v Williams, 565 So.2d 714 (Fla. 3d DCA (1990).* In the instant case, we have only one officer; one without reasonable articulable suspicion or the requisite probable cause; one who cannot simultaneously be on the radio in his car and out searching a vehicle with an aggressive dog while the vehicle is occupied by scared, non-English speaking travelers; one officer, who cannot claim he is not artificially extending the time of the stop.

Point III. Deputy Watson had no factors constituting recognized exceptions to the warrant requirement when he initiated his search with the help of his dog; he did not ask permission to search the Appellant's truck. Deputy Watson stopped the Appellant's pickup for speeding and without any reasonable suspicion of any other law violations or criminal conduct, he released his Narcotics Detector Dog, approached the drivers side of Appellant's pickup, advised the occupants that he was going to have his drug dog do a "drug detection." He then started a "walk around" of Appellant's pickup; he gave his dog the "search command" and at the rear of the pickup, the dog, Rudy, made a "hit". That "hit" led the Deputy to tear apart the bed of the truck and the subsequent discovery of marijuana between the bed-liner and the bed of the Appellant's pickup truck. (R. 156 p.21 ll. 19-22).

The above actions of Deputy Watson constitute a search of the Appellant's pickup truck without any probable cause whatsoever and without even a scintilla of any indication that Appellant or his passengers had done anything illegal except exceed the speed limit.

Without probable cause, or a search warrant, and no factor being present to constitute any recognized exception to the warrant requirement, Deputy Watson failed to ask for, or obtain, consent from any of the occupants of Appellant's

truck prior to searching the same.

If the dog indicating on the right seam of the tailgate is probable cause, then a warrant should have been obtained before tearing apart the vehicle on the highway. The separation of the bed-liner from double-sided tape in the western dry climate is no surprise. The movement of the rear end, left corner, of the bed-liner, one-half to one inch, after the tape loses its adhesion, shouldn't arouse surprise; it doesn't create exigent circumstances. Since that separated corner is four feet away, on the opposite side of the truck from the only area hit on by the dog, it is not probable cause.

Said search was grossly unconstitutional.

POINT IV: Deputy Watson had no articulable reasonable suspicion or probable cause, and he did not ask for consent or receive valid voluntary permission to do a search of the vehicle, nor did he request or obtain a warrant at any time during the stop or the subsequent trip to the Kane county sheriffs office where the bed of the truck was completely dismantled.

Deputy Watson had not arrested anyone at the time he physically pulled the left rear end of the bed-liner aside, as far as he could get it to move, and even in daylight, he still needed a flashlight to see the packages, three to four feet toward the front of the truck bed, between the liner and the side wall of the pickup. His stated probable cause was that his Narcotics Detector Dog had

indicated on the tailgate seam on the opposite side of the truck.

Point V. When an Officer of the law, who speaks no Spanish, questions a person who speaks no English, then acts on a perceived response to that interrogation, he occupies very thin ice if he testifies that the stringent requirements of *Miranda* have been met. One could wonder if the Appellant would have gotten a better answer if he had asked the purpose of a bathroom than he received when he asked the purpose of a lawyer. The explanation he did receive in response to his inquiry, as to the purpose of a lawyer, is a more accurate description of a judge. In the instance, it was incumbent upon the Trooper to speak the words, in the best Spanish he could muster, "do you want an attorney present?" That did not happen. There is no indication in the record that Appellant ever waived his *Miranda* rights.

Further, there is clear evidence in the record that, before Appellant confessed, Deputy Watson threatened to have Appellant's daughter arrested and to have his infant grandchild placed in foster care.

ARGUMENT

POINT I

POINT I. THE MINOR VIOLATION BY THE DEFENDANT OF A TRAFFIC RULE DID NOT PROVIDE REASONABLE SUSPICION OR PROBABLE CAUSE TO ALLOW DEPUTY WATSON TO LOOSE HIS NARCOTICS DETECTOR DOG AND SEARCH THE

DEFENDANT'S TRUCK.

That this was a search of Appellant's vehicle by Deputy Watson with the assistance of his dog, Rudy, is clear from the testimony of Deputy Watson.

The following portions of his testimony from the transcript make it clear as to when the Deputy seized the Appellant's vehicle and its occupants and when the search of said vehicle began.

After Deputy Watson's initial contact with the occupants of Appellant's pickup truck, where Deputy Watson had found nothing unusual or out of order (R.156 p.14 Il. 25-p. 17), he returned to his vehicle, called dispatch and took his drug detection dog from his patrol vehicle (R.156 p. 16 Il. 20-24).

The following then occurred:

Q Did you command her (dog) to do anything? (Parentheses added)

A Yes, I did.

Q I gave her--well, first I went up to the window and explained to them what I was gonna do, that I was gonna walk my dog around their truck.

Q Which side of the vehicle did you approach to make that explanation?

A The driver's side.

Q And did you, in fact, inform the occupants of the vehicle that you

intended to have Rudy, do a drug detection, for lack of a better word?

A Correct. I just -- I explained to everybody just to sit tight. I was gonna walk my dog around their car. (emphasis added) That way they don't -- so people that are nervous about dogs, I don't want them to try to get out or anything.

Q What happened next?

A I started on the driver's front side by the bumper and I gave Rudy her search command and walked her around along the driver's side of the vehicle to the tailgate and along the back of the tailgate. (emphasis added)

Q There's a term that we use often, regarding Rudy, "indicate". Did Rudy indicate on this vehicle?

A Yes, she did.

Q In this situation or in situations generally, what is Rudy's reaction when she indicates on something?

A Rudy is an aggressive indicator. She will scratch, bite, or bark at the --at the source of the odor that she detects. (emphasis added)

Q Where did Rudy indicate on this vehicle?

A She indicated on the seam of the tailgate on the right side, the passengers' side of the tailgate. (emphasis added)

Q Anywhere else?

A No. (R. 156 p.17 ll. 16-p.18)

Deputy Watson seized the pickup and its occupants when he told ". . . everybody just to sit tight." That he was just going to walk his dog around their vehicle. At that point, the Deputy had nothing upon which base any suspicion of any illegal activity by anyone.

He activated the search of Appellant's vehicle when he . . . gave Rudy her search command and walked her around along the driver's side of the vehicle. . . ."

A new wrinkle turns up in the suppression hearing, where, under cross examination, Deputy Watson, at (R. 158, p. 60, ll. 15-24), gives this story:

> I stopped the truck and went to the driver. I then obtained their identification. I then went back to my truck. I radioed in a request for a drivers license check and a vehicle registration check. While I was waiting for that to come back,, I got my dog out of the back of the truck. I went up to the driver of the truck with the dog. I informed them I was gonna walk the dog around the outside of the car. I asked them to stay in the truck. I asked them to roll up their windows and turn their vent on high. (emphasis added)

By ordering the occupants of the vehicle to "roll up the windows and turn the vent on high" this was a search of the inside odors of the pickup, and a search of the odors of the occupants of the vehicle, under the pretext of an exterior search by the Deputy, with the assistance of his dog. Deputy Watson elevated this stop to a level two detention by effectively seizing the vehicle and the occupants therein.

The act was tantamount to the opening of the car door. Quoting State v. James, 977 P.2d 489, 1999 UT App 17, 361 Utah Adv. Rep. 49 (Utah App. 01/28/1999)

[25] I. Legality of Opening the Door

[26] "Although a person has a lesser expectation of privacy in a car than in his or her home, one does not lose the protection of the Fourth Amendment while in an automobile." State v. Schlosser, 774 P.2d 1132, 1135 (Utah Ct. App. 1989) (citation omitted); see also New York v. Class, 475 U.S. 106, 114-15, 106 S. Ct. 960, 966 (1986) ("[A] car's interior as a whole is . . . subject to Fourth Amendment protection from unreasonable intrusions by the police."). Upon stopping a driver to investigate a possible traffic violation, an officer may temporarily detain the driver, passengers, and vehicle to examine the vehicle registration and driver's license. See Schlosser, 774 P.2d at 1135. For protection, the officer may also direct the driver to exit the vehicle. See id. If no arrest ensues, the officer may conduct a warrantless search of the vehicle only when (1)probable cause supports it or (2) the officer is able to articulate reasonable suspicion that the suspect may be dangerous. See id.

[27] It is well settled that a police officer's opening of a vehicle's door constitutes a search. See Class, 475 U.S. at 115, 106 S. Ct. at 966 (holding that officer's opening of driver's side door to see vehicle identification number was search under Fourth Amendment); Larocco, 794 P.2d at 466 (concluding that "constitutional privacy interest exists in the interior of an automobile and that the opening of the car door by the police officer here constituted a search"); Schlosser, 774 P.2d at 1137 (stating that officer's "action of opening the car door constituted a search, not an investigative detention, and therefore, the probable cause standard was correctly applied by the trial court"); see also Arizona v. Hicks, 480 U.S. 321, 325, 107 S. Ct. 1149, 1152-53 (1987) (stating that even minor intrusion beyond legitimate scope of initially legal investigation violates Fourth Amendment); Commonwealth v. O'Connor, 487 L.Ed.2d 238, 239-40 (Mass. App. Ct. 1986) (suppressing evidence from car stop because "officer had no right to open the car door"). We must thus initially reject out of hand the State's rather cursory contention that Trooper Kendrick's action was not a search, but part of his valid investigative detention of James.

All of that searching without a scrap of probable cause is, undoubtedly, what the framers of the constitution had in mind when they wrote Article I, Section 14, of the Utah Constitution.

The appellant does not dispute Deputy Watson's right to stop the truck in question. However, the burden is on the State to show that a warrantless search is lawful. *See, State v. Christensen,* 676 P.2d 408, 411 (Utah App. 1984). "Again, ... even if the circumstances are such that the police are excused from the necessity of having a search warrant for an automobile, they are nevertheless authorized to conduct a search of a vehicle for evidence only if they possess probable cause that particular items of evidence are presently concealed therein." (emphasis added) Wayne R. LaFave, *Search and Seizure,* Second Edition 1987, section *5.2(c).* The United States Supreme Court defines probable cause as facts and circumstances within (the officers') knowledge sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *See, Brinegar v. United States,* 388 U.S. 160, 175 (1949). After a routine traffic stop, the detaining officer must be able to articulate a particular and objective basis for their suspicions that is drawn from the totality of the circumstances facing them at the time of the seizure. *See, United States v. Cortez,* 449 U.S. 411, 417-418 (1981). The State bears the burden of

establishing both probable cause and exigent circumstances in order for a warrantless search to fall within the automobile exception to the requirements of Art. I, Section 14 of the Utah Constitution. *See, State v. Larrocco,* 794 P.2d 460, 470 (Utah 1990).

In *State v. Robinson,* 797 P.2d 431 (Utah App. 1990), the court held that troopers did not have reasonable suspicion of criminal activity necessary to justify continued detention and questioning of defendants once warning citation was given and purpose for initial stop had been accomplished. In *Robinson,* Defendants appealed their conviction of unlawful possession of a controlled substance found while troopers were conducting a routine traffic stop. Officers stopped the vehicle for improper passing. The officers made a routine check on the driver's license and vehicle registration and found the vehicle was not registered to either of the occupants. The defendants explained that their boss at a floor covering business had allowed them to take the work van on a two-week fishing trip to Wyoming. While checking out their story, the officers noted the nervousness of the occupants and observed that a homemade bed, two feet high, filled the back of the vehicle. Based on what they observed, the trooper determined to ask consent to search the vehicle. *Id., at* 433. The Defendant, Robinson, consented and the troopers observed five marijuana seeds in the rear corner of the van. When the officers failed to get consent from Robinson to look

under the bed, the officers stated that they would attempt to get a search warrant. Officer Ogden then asked Robinson, "Since you won't let us take the plywood panel off the van to look under the bed, would it be all right if we let a dog go through the vehicle?" Robinson replied, "Yes," and asked if allowing the dog to sniff meant giving consent to search. The Officer said "yes" and Robinson shook his head affirmatively. The defendants were later arrested when the dog gave a positive alert at the rear of the bed in the van and the trooper located eight duffel bags of marijuana in the space under the bed. *Id.*, at 434. The court concluded that, in light of the troopers' questioning and conduct, the coercive atmosphere at the time, and the other surrounding circumstances, the State had not borne its burden to show that the search of the vehicle was lawful. They reached the same conclusion about Robinson's subsequent consent to allow the narcotics dog to search the van interior. *Id.*, at 438.

From the foregoing case, a number of conclusions analogous to the case at a bar can be inferred: (1) that a "sniff" by a trained narcotics dog does constitute a "search"; (2) that a "search" conducted by a dog without particular and articulable facts to sustain a warrantless search under the automobile exception does require voluntary consent; and (3) that without consent or particular and articulable facts establishing probable cause on the part of the officer, such a "search" violates the fourth amendment of the U.S. Constitution

and Constitution of the State of Utah.

In the case at bar, Deputy Watson testified he stopped the vehicle in question for exceeding the speed limit of 55 miles an hour. (R. 156 p. 12). After stopping the vehicle, the driver produced a valid Arizona driver's license. (R. 156 p. 15). After he contacted his dispatcher for verification of the driver's license and vehicle plates, he got a certified narcotics detector dog from his police vehicle. (R. 156 p. 16-17). At that point, he had no particular reason to let the dog out of his vehicle. (R. 156 p. 17). He explained that he was going to walk the dog around the vehicle, but he did not obtain consent from any of the occupants in the vehicle. (R. 156 p. 17). Because it was only after the dog indicated a hit that the officer formulated articulable facts, which possibly gave rise to probable cause sufficient to make a warrantless search of the vehicle, the search was illegal under the automobile exception. (R. 156 p. 19-2 1). The burden is on the State to show that evidence obtained following illegal police conduct is attenuated from the illegality. *See, Brown v. Illinois,* 422 U.S. 590, 604 (1975). The State completely failed to make such a showing.

Since Deputy Watson lacked probable cause to conduct the non-consensual search with the aid of his dog, the warrantless search of the vehicle that led to the discovery of the illegal marijuana, violated Defendants" Fourth Amendment

rights and Article I, Section 14 of the Utah Constitution.

Additionally, the opening of the tailgate by Appellant could not have been a voluntary consensual act since the Defendant could not understand the inquires made by the Deputy, nor the consequences of compliance. Deputy Watson knew Appellant Juarez could not speak nor understand English. (R. 156 p. 15, 19-20). Even knowing that, Deputy Watson removed Appellant from the vehicle and out of earshot of the only person at the scene who could understand English, or translate and continued to make inquiries of Appellant. In his attempt to comply with his perception of the Deputy's inquiries, Appellant, not knowing he could refuse, opened the tailgate and pulled out a suitcase that allowed Deputy Watson to observe the opening between the bed and the bed-liner. Deputy Watson then conducted a non-consensual and warrantless search that lead to the discovery of the contraband. (R. 156 p. 20). Deputy Watson had neither consent nor particular and articulable facts to support the warrantless search of the rear of the vehicle, nor under the circumstances could he justify his warrantless search under the plain view doctrine. Consequently, the warrantless search of the vehicle by the Deputy with the aid of his dog and the resulting "fruits of the poison tree" must be suppressed due to the non-consensual and coercive nature and circumstances surrounding the initial stop.

POINT II. DEPUTY WATSON UNLAWFULLY DETAINED THE DEFENDANT BY FAILING TO COMPLETE THE PURPOSE OF HIS INITIAL REASON FOR THE STOP AND INTERRUPTING THE FLOW OF THAT TRANSACTION TO PURSUE A SEARCH WITH HIS DOG.

Extending the time of a traffic stop to do a dog assisted search of a vehicle has been upheld in other jurisdictions, but, in those cases, they had either reasonable, articulable suspicion, requisite probable cause or two officers, one working the traffic stop and the second handling the dog. The two-man operation satisfied the requirement in that jurisdiction of not extending the time required for the primary reason for the stop. *State v Williams*, 565 So. 2d 714, Fla. 3rd DCA (1990). The rule is otherwise in this jurisdiction.

In the instant case, we have only one officer; one without requisite, reasonable, articulable suspicion; one who cannot simultaneously be on the radio in his car and out searching a vehicle with an aggressive dog (R. 156 p. 18 Il. 17-19) while the subject vehicle is occupied by three adults, and a baby only one of which speaks English. In *State V.* Lopez, 873 P.2d 1127, 1132 (Utah 1994), the Utah Supreme Court held as follows:

* * *

> To determine whether a search or seizure is constitutionally reasonable, we make a dual inquiry: (1) was the police officer's action "justified at its inception"? And (2) was the resulting detention "reasonably related in scope to the circumstances that justified the interference in the first place"? Id. At 19-20.

* * *

As to the first inquiry, a police officer is constitutionally justified in stopping a vehicle if the stop is "incident to a traffic violation committed in the officers' presence." *State v. Talbot*, 792 P. 2d 489, 491 (Utah Ct. App. 1990); see also *State v. Marshall*, 791 P.2d 880, 881-83 (Utah Ct. App. 1990); *State v. Sierra*, 754 P.2d 972, 975 (Utah Ct. App. 1998). An observed traffic violation gives the officer "at the least, probable cause to believe the citizen had committed a traffic offense." *State v. Smith*, 781 P.2d 498,500 (8th Cir. 1990) (holding that "[w]hen an officer observes a traffic offense--however minor-- he has probable cause to stop the driver of the vehicle"); *State v. Cole*, 674 P.2d 199,123 (Utah 1983). An observed violation, however, is not required. Stopping a vehicle may also be justified when the officer has "reasonable articulable suspicion that the driver is committing a traffic offense, such as driving under the influence of alcohol or driving without a license . . . [or that] the driver is engaged in more serious criminal activity, such as transporting drugs." *State v. Lopez*, 831 P.2d 1040, 1043 (Utah Ct. App. 1992); see *State v. Deitman*, 793 P.2d 616, 617-18 (Utah 1987). In the words of the United States Supreme Court, as long as an officer suspects that the "driver is violating any one of the multitude of applicable traffic and equipment regulations," the police officer may legally stop the vehicle. *Prouse*, 440 U.S. at 661.

The second question is whether the stop was reasonably related in scope to the traffic violation, which justified it in the first place. Once a traffic stop is made, the detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Roger*, 460 U.S. 491, 500 (1983). Both the "length and [the] scope of the detention must be strictly tied to and justified by' the circumstances which rendered its initiation permissible." *State v. Johnson*, 805 P.2d 761, 763 (Utah 1991) (quoting Terry, 392 U.S. at 19-21). This means that an officer conducting a routine traffic stop may request a

> driver's license and vehicle registration, conduct a computer check, and issue a citation. However, once the driver has produced valid drivers' license and evidence of entitlement to use the vehicle, "he must be allowed to proceed on his way, without being subjected to further delay by police for additional questioning."

State v. Robinson, 797 P.2d 431, 435 (Utah Ct. App. 1990) quoting *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988) held that investigative questioning that further detains the driver must be supported by reasonable suspicion of more serious criminal activity. Deputy Watson had no suspicion of criminal activity (other than speeding) in the instant case. The Deputy legally stopped the Defendant's vehicle; called dispatch, did not commence writing the driver a citation for speeding, but rather initiated a search of Defendant's pickup truck. During direct examination by the Kane County Attorney, Colin R. Winchester at (R. 158, p. 53 ll. 17 – 25, p. 54 ll. 1 – 10), Deputy Watson advises that the response time for verification from his Dispatcher ranges from a minimum of thirty seconds to as much as two minutes. At (R. 158, p. 53, ll. 1 – 8), responding to Mr. Winchester's query of how soon after the stop Deputy Watson got out his dog he states: ... "I then took their drivers licenses back to my truck, the time it would have taken to read their names into the radio, because I ran records on the vehicle and on the drivers license. And then after I

ran the records check over the radio, I got my dog out and went back to the car. So it couldn't have been more than just a couple of minutes. Probably about three or four. Four, I think."

In that same period of time he could have finished his verification with the dispatcher, if he hadn't already, and been partially finished writing the citations for speeding and no child seat. He states that, after bringing the Defendant to the rear of the truck, and having a conversation with him, that he returned to his patrol vehicle and the radio dispatcher advised him that the occupants of the Juarez truck were not wanted by any authorities. (R. 158, p. 61, ll. 5 – 13).

In *State v. Schlosser*, 774 P.2d 1132 (Utah 1989), the following facts were at hand: The officer observed the driver doing 42 mph in a 35 mph zone, while stopping the vehicle he observed the passenger of the pickup bending over, acting fidgety, turning left to right, and turning back to look at the officer. Also, when the stop was made, the driver met the officer between the two vehicles and the passenger continued to move about in the cab causing the officer to conclude that the passenger was trying to hide something. The officer then approached the passenger door; tapped on the window, and immediately opened the door, whereupon the officer saw marijuana and paraphernalia in the cab in plain view. In that case (*Schlosser*, Id.), the Utah Supreme Court sustained the

trial court's suppression of the evidence and, in doing so, wrote the following:

* * *

> The state argues that the officer's opening the door constituted an extension of an "investigative detention" and that the officer's actions were lawful because defendants' activities gave rise to a reasonable suspicion either of criminal activities or of danger to the officer's personal safety. Therefore, the State asserts that the judge erroneously applied a probable cause standard instead of a reasonable and articulable suspicion standard in the hearing on the motion to suppress. As stated above, Officer Howard's action of opening the car door constituted a search, not an investigative detention, and therefore, the probable cause standard was correctly applied by the trial court. However, even if the State's premise were accepted that no search occurred, the facts do not support a reasonable and articulable suspicion standard in the hearing on the motion to suppress. As stated above, Officer Howard's action of opening the car door constituted a search, not an investigative detention, and therefore, the probable cause standard was correctly applied by the trial court. However, even if the State's premise were accepted that no search occurred, the facts do not support a reasonable and articulable suspicion of criminal activity which is necessary to support the State's position. See *State v. Dorsey*, (Citation omitted); *State v. Carpena*, (Citation omitted); *State v Swanagan*, (Citation omitted).
>
> An investigative detention is justified if a police officer has a reasonable and articulable suspicion that the automobile's occupants are "involved in criminal activity." *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); *Dorsey*, 731 P.2d at 1087, 1090. Additionally, an officer may search a vehicle for weapons if he has a reasonable belief that the suspect is dangerous and "may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 3481, 77 L.Ed.2d 1201 (1983). In such instances, "due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392

U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968).

* * *

Here, Officer Howard had no probable cause, and no articulable suspicion either that his safety was in danger or that the occupants were engaged in criminal activity. He cited no safety concerns as the basis for his actions; he sought only to investigate the possibility that defendants were engaged in illegal activity, and for that reason he opened the passenger door. Here Deputy Watson, like officer Howard, had no probable cause, and no articulable suspicion that his safety was in danger or that the occupants were engaged in criminal activity. Unlike Officer Howard, Deputy Watson didn't even have anyone acting fidgety or nervous. Deputy Watson did have the fact that two (2) of the three (3) adult occupants couldn't speak English, and that is all he had when he gave his dog the command to search.

Deputy Watson has offered nothing in the way of suspicion to justify his search of Appellant's vehicle, not even a hunch. The Deputy should have issued Mr. Juarez a citation for speeding and sent him on his way.

POINT III. ABSENT VALID EXCEPTIONS TO THE WARRANT REQUIREMENT, DEPUTY WATSON FAILED TO OBTAIN VALID VOLUNTARY CONSENT TO SEARCH THE PICKUP TRUCK.

Analyzing this action as is reflected in the transcript (R. 156 P 12, ll. 3-4, 19-20, 23-24, p. 13, ll. 3-5), and Deputy Watson's report (R. 9) Watson sees the truck coming toward him, turns his radar gun on, clocks the Appellant at 68 in at 55 mph zone, turns on him and pulls him over for a stop. So far so good. Deputy Watson makes contact with the driver of the vehicle, requests papers of not only the driver but all the occupants of the vehicle and finds them in good order. (R.156 p. 14, ll. 25, p.15, ll. 21-23, p. 16, ll. 11-17). Rather than writing a ticket for speeding and sending the people on their way he decides to do a radio check with his dispatcher. (R. 9, R.156 p. 16 ll. 21-22) (R. 158 p. 60, ll. 15

–24). He has no suspicion of any criminal activity beyond the routine speeding violation. (R. 9, R.156 p. 17, ll. 9-12). At this point Deputy Watson had no exceptions to the warrant requirement, he did not ask permission to search the Defendant's truck and yet, he then started a search of appellants' truck (R. 156 p. 17, ll. 13-25, p.18, ll. 1-11, p. 20, ll. 25, p. 21, ll. 1-2). If the dog indicating on the right seam of the tailgate, of the pickup truck, is probable cause, then Deputy Watson should have been obtained a warrant before tearing apart the rear or the Defendant's pickup truck on the highway (R. 9, R156 p. 21, ll. 9-25). The separation of the bed-liner from double-sided tape in the western climate is no surprise. The movement of the rear end, left corner, of the bed-liner, one-half to one inch, after the tape loses its adhesion, should not arouse suspicion (R. 9, para 4 R. 156 p. 20, ll. 19-24); it doesn't create exigent circumstances.

Deputy Watson did not ask any of the occupants of Appellant's truck if he could search the pickup and thus, obtained no consent. Appellant's actions in reaching for the suitcase does not constitute consent to search because he could not understand the language used by Deputy Watson.

In *State v. Thurman*, 846 P.2d 1256 (Utah 1993), the Utah Supreme Court stated, at page 1257, the following:

* * *

Voluntariness is primarily a factual question, see *Schneckloth v.*

Bustamonte, 412 U.S. 218, 248-49 (1973), and the analysis used to determine voluntariness is the same without regard to whether the consent was obtained after illegal police conduct. If the court determines that the consent was not voluntary, no further analysis is required; the consent is invalid, and the proffered evidence must be excluded. *Arroyo*, 796 P.2d at 688; *State v. Valdez*, 748 P.2d 1050, 1056 (Utah 1987); *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980).

In *Arroyo*, we said that "whether the requisite voluntariness exists depends on" the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of police conduct." 796 P.2d at 689 (quoting *Schneckloth*, 412 U.S. at 226); accord *State V: Robinson* 797 P.2d 431, 437 (Utah Ct. App. 1990). Our cases before *Arroyo* make clear that both the "characteristics of the accused" and the "details of police conduct' must be considered in determining whether a defendant's consent was actually a product of his or her free will. See *Valdez*, 748 P.2d at 1056; *Whittenback*, 621 P.2d at 106 n.14. The prosecution bears the burden of proving that the defendant's consent was voluntary. *State v. Iacono*, 725 P.2d 1375, 1377 (Utah 1986) (per curium); (Citations omitted)

The second determination to be made in deciding whether a consent following police illegality is valid is "whether the consent was obtained by police exploitation of the prior illegality," *Arroyo*, 796 P.2d at 688; see also *Sims,* 198 Utah Adv. Rep. At 6; cf. *Allen*, 839 P.2d at 300, or in other words, "whether the 'taint' of the Fourth amendment violation was sufficiently attenuated to permit introduction of the evidence," *Harris*, 495 U.S. at 19 (citing *Crews*, 445 U.S. at 471). The principle underlying the exploitation test is that the Fourth Amendment should not permit law enforcement to "ratify their own illegal conduct by merely obtaining a consent after the illegality has occurred." *Arroyo*, 796 P.2d at 689. *Arroyo*'s primary goal was to deter the police from engaging in illegal conduct even though that conduct may be followed by a voluntary consent to the subsequent search.

* * *

In the instant case, the prior illegality occurred when Deputy Watson

seized the defendant's pickup and its occupants by ordering them to roll up the windows and turn the vent blower on high and commenced his search of Appellant's pickup truck (R. 156 p. 17-18 ll. 1-11) (R. 158, p. 60, ll. 20 – 24). Thereafter, he claims that appellant's actions (moving the suitcase) constituted consent to search.

Clearly Appellant did not consent to the search of his truck and it cannot be argued in good faith that a man who does not speak English being spoken to in English, attempting to obey an officer, has voluntarily consented to the search by his actions. Further, there was no attenuation between the police illegality and the search of the bed of the pickup by the Deputy.

POINT IV. THE SEARCH OF THE PICKUP BED WAS NOT JUSTIFIED BY "PROBABLE CAUSE" OR "INCIDENT TO ARREST" EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES AND/OR THE UTAH CONSTITUTION.

Deputy Watson had not arrested anyone at the time he physically pulled the left rear end of the bed-liner aside, as far as he could get it to move. At that time and in daylight, he still needed a flashlight to see the packages, three to four feet toward the front of the truck bed, between the liner and the side wall of the pickup. His stated probable cause was that his Narcotics Detector Dog had indicated on the tailgate seam on the opposite side of the truck. When the

tailgate was opened and the dog jumped up onto the tailgate, and actually into the interior of the truck bed, the dog gave no indication of the presence of any drugs, whatsoever. Deputy Watson should have been satisfied, if he believed in his dog so strongly, that there was nothing forward of the tailgate and stopped any further inquiry at that point. That should have negated any perceived probable cause. It was after this point that he saw the left sidewall of the bed-liner separated from the double-sided tape, 2 to 1 inch from the left sidewall of the pickup bed. It was his search of the left sidewall that first revealed what turned out to be marijuana.

Further, no exigent circumstances existed.

In State v. Mark A. Vanholten, 756 P.2d 1288, (UT. App.1988), the Utah Court of Appeals points out the need for exigent circumstances as follows:

* * *

> The State has the burden of proving that "the exigencies of the situation made [the search] imperative." State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 445 (1971)). One type of exigent circumstance identified by the Supreme Court is when preservation of the evidence might be endangered by the delay in obtaining a warrant. Schmerber v. California, 384 U.S. 757, 770-71 (1966).

* * *

Probable cause is not the only requirement of the "automobile exception" rule.

In State v. Christensen, 676 P.2d 408, (Utah 1984), the Utah Supreme

Court clearly outlined the requirements of the "automobile exception" rule in Utah, as follow:

* * *

> . . . there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.

* * *

> For this exception to apply, the police must have probable cause to believe that the automobile contains either contraband or evidence of a crime and that they may be lost if not immediately seized ...

* * *

In the instant case, both requirements are absent. The Deputy had no probable cause. The truck was not going anywhere.

Probable cause consists of facts and circumstances within (the officers') knowledge sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. The State bears the burden of establishing both probable cause and exigent circumstances in order for a warrantless search to fall within the automobile exception under Art. I Section 14 of the Utah Constitution, See, State v. Larrocco, 794 P.2d 460, 470 (Utah 1990).

POINT V. ANY AND ALL ADMISSIONS DURING THE INITIAL STOP OF THE VEHICLE AND CONFESSIONS BY DEFENDANT WHILE IN CUSTODY WERE OBTAINED IN VIOLATION OF DEFENDANT'S *MIRANDA* RIGHTS AND THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION AND THE CONSTITUTION OF THE STATE OF UTAH

When an Officer of the law, (Trooper Davis), who speaks poor Spanish, questions a person who speaks no English, then acts on a perceived response to that interrogation, he occupies very thin ice if he testifies that the stringent requirements of Miranda have been met. One could wonder if the Defendant would have gotten a better answer if he had asked the purpose of a bathroom than he received when he ask the purpose of a lawyer. The explanation he did receive in response to his inquiry, as to the purpose of a lawyer, is a more accurate description of a judge. In that instance, it was incumbent upon the Officers to speak the words, in the best Spanish they could muster, "Do you want an attorney present?" Involuntary admissions and confessions violate the due process clause of the Fourteenth Amendment of the U.S. Constitution. *See, Brown v. Mississippi,* 297 U.S. 278 (1936). The Fifth Amendment privilege against self-incrimination is made applicable to the states through the Fourteenth Amendment. *See, MALLOY v. Hogan,* 378 U.S. 1, 6 (1964). Under the Fifth Amendment, "the test is . . . whether the confession was free and voluntary; that is, it must not be extracted by any sort of threats or violence, not obtained by any direct or implied promise, however slight, not by the exertion of any improper influence." *Id.,* at 7. The keystone for determining the admissibility of any statements obtained through custodial interrogation is found in *Miranda v. Arizona,* 384 U.S. 436 (1966). As a constitutional perquisite to any questioning,

an individual held for interrogation by a law enforcement officer must be warned in clear and unequivocal terms that he has the right to remain silent, any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Id.,* at 444-445. The requirements of warning and waiver of rights is fundamental to the exercise of the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation. *Id.,* at 470. The determination of whether a defendant was aware of his rights and effectively waived them are assessed (1) on the background of the person being interrogated and (2) the circumstances surrounding the custodial interrogation. A defendant may effectually waive rights enumerated in the *Miranda* warning provided the waiver is made voluntarily, knowingly and intelligently. *Id.,* at 444. Assessment of the knowledge the defendant possesses is based on his age, education, intelligence, and prior contact with authorities. *Id.,* at 468-469. In determining whether a defendant effectually waives the rights enumerated in the *Miranda* warning, the State has the burden of proof to establish from the totality of the circumstances that the consent was voluntary. *See, State v. Moore,* 697 P.2d 233, 236 (Utah 1985). A confession of the accused must be the product or result of free and unconstrained choice. *See, State v. Strain,* 779 P.2d 221, 224 (Utah 1989). A

confession cannot be exacted by threats, or violence, or obtained by improper influences, or promises, and still be deemed to be voluntary. *See, State v. Watts,* 639 P.2d 158, 160 (Utah 1981). The State bears the burden of proving, by at least a preponderance of the evidence, that the Appellant's confession is voluntary. *See, State v. Bishop, 753* P.2d 439, 463 (Utah 1988). In the case at bar, even though officers gave *Miranda* warnings during the initial arrest of the parties and again at the beginning of the interrogation process after Appellant was at the jail, the Appellant contends, that any and all admissions by Appellant, were obtained in violation of the principles espoused in *Miranda,* and the due process rights, guaranteed under the U.S. Constitution and the Constitution of the State of Utah, as there is no evidence, in the record, that his admissions were voluntary, knowing and intelligently made. There is no evidence to support the officers' claims that the confession was given voluntarily, knowingly, and intelligently. To the contrary, the evidence indicates they had the opportunity and equipment available at hand to create an electronically recorded record of the *Miranda* warnings on the highway, and at the jail during the entire interrogation and that was not done. (R. 156 p. 24 ll. 15-25, p. 25 ll. 1-2, p. 32 ll. 2-3, 18-19, 22-23, p. 38 l. 17, p. 40). There is both direct testimony and circumstantial evidence substantiating the fact that the Defendant's confession was obtained through his ignorance of his fundamental rights and induced by the

intimidating, restrictive, and coercive police investigative and interrogating techniques. (R. p. 19 ll. 9-25, p. 20 ll. 1-2, p. 20 ll. 4-8, p 23 ll. 10-12, p. 23, ll. 19-20, p. 23 ll. 8-21, p. 41 ll. 21-25, p. 42 l.1, p. 42 ll. 2-8, p. 52 ll. 21-25, p. 53 ll. 1-15. p. 61 l. 25, p. 62 ll. 1-3 p. 86-87, p. 62 ll. 16-25, p. 63 ll. 1-6, p. 97 ll. 14-25, p. 98 ll. 1-18, 112-113, p. 99 ll. 24-25, p. 100, ll. 1-5, p. 101 ll. 14-18, 22-24, p. 102 ll. 4-10, p 102 ll. 7-10, p. 114 ll. 2-7) (R. 110 para 28 and 31) (R. 157 p. 8 ll. 5-7).

Trooper John Davis, in his Spanish, administered at the scene, and again at the jail, the *Miranda* warning. (R. 156 p. 30-32, 36). The court approved licensed interpreter critiqued the Spanish of the interrogating officer. (R. 65 para 3). When translating the taped confession from Spanish to English, in the endnotes of the transcriber, Robert T. Behunin, 1202 W. 800 S., Cedar City, UT 84720, (801) 586-1457, remarking about the bad conjugation of the verb "poner" stated: "the person asking the questions doesn't understand this rather basic verb structure." (R. 65 para 3).

Thus, one could surmise from the pronunciation and the methods of combining words from English to Spanish, that Appellant lacked comprehension of, and/or any meaningful understanding of, the legal rights afforded within the *Miranda* warning and the significance and consequences of voluntarily waiving the rights contained therein. (R. 64 para 1). Paraphrasing and/or rendering of the language

by Trooper Davis, in asking the questions and in acting as the interpreter, and/or Appellant's lack of understanding of the context of the English language, it is more probable than not, that the Appellant Juarez did not understand the rights afforded him under *Miranda*, thus, Appellant could not have effectively waived his due process rights. (R. 156 p. 33, 36, 70-71, 82-83, 102-104).

Whether a waiver of the right to counsel is made knowingly and intelligently depends upon the particular fact and circumstances surrounding the case, including the background, experience and conduct of the accused. *See, State v. Woods,* 868 P.2d 70, 86 (Utah 1993). After Miranda and during the in-custody interrogation of Appellant Juarez, he asked the purpose of a lawyer before making any admissions against interest. (R. 156 p. 101-102). Trooper Davis attempted to explain to the Appellant what a lawyer was, but at no time did he clarify that the *Miranda* warning allowed him to have a lawyer present during the instant interrogation, and at no time did Trooper Davis say, "you have the right to remain silent", nor did the Trooper, at that time, obtain a waiver from the Appellant. (R. 156 p. 101-102). An individual held for interrogation must be clearly informed that he has a right to consult with a lawyer and to have the lawyer with him during interrogation. *Miranda,* 384 U.S. at 471. Only by effective and express explanation to the defendant of this right can there be assurance that he is truly in the position to exercise it. *Id,* at 473. From

Appellant Juarez question (R. 156 p. 101 ll. 14-18, 22-24) alone, one would surmise that he did not understand his right to consult with an attorney and his right to have an attorney present during questioning and, not the least of which, the right to remain silent or the consequences of waiving that right to remain silent.

Other than the estimation by the officers themselves that Appellant did waive his rights, the State failed to produce any evidence that the statements, admissions, and/or confessions made by the Appellant were made voluntarily, knowingly and intelligently, or that the Appellant effectively waived his rights under *Miranda,* or the due process clause, of the U.S. Constitution or Constitution of the State of Utah. Therefore, any and all admissions and/or confessions by the Appellant must be suppressed

Appellant was interrogated in the presence of three officers. Interrogation tactics and techniques employed while questioning defendants, make it more probable than not, that Appellant was coerced and intimidated into making statements, admissions and/or confessions against his penal interests. In *State v. Ashdown,* 296 P.2d 726, 731 (Utah 1956), the Utah Supreme Court adopted the general rule stated in 20 Am.Jur. *Evidence* ' 508 (1939), which states:

> "[T]elling the accused that it would be better for him to speak or tell the truth does not furnish an inducement, or

sufficient inducement, to render objectionable a confession thereby obtained, unless threats or promises are applied."

(emphasis added)

In this instant case, threats were used. (R. 156 p. 62-86-87-97-98, 112 -113)

Interrogation techniques utilized by police may not be so outrageous and coercive as to overcome Appellant's will and induce him to talk when he otherwise would not have done so. *See, State v. Hegelman,* 717 P.2d 1348, 1350 (Utah 1986).

In *State v. Griffin,* 754 P.2d 965, 970 (Utah 1988), the following examples of coercive interrogative language were held to be sufficient to warrant suppression of the resulting confession:

> [I]n order for you to ever have a relationship with your daughter again then you're going to need to get some extensive help and after that time and only after that time would it be possible for you to be reunited with your daughter again. And in order for you to receive any help for the problem, you are going to have to admit there is a problem. Right now, I am only charging you with one. But more charges are going to follow.
>
> It boils down to the fact you did do it and you need some help and we can get you that help.
>
> Whether or not you admit it to me, I'm going to build a case against you and I'm going to convict you.

In the case at bar, the officers used similar language during interrogations to induce statements, admissions, and/or confessions. Deputy Watson made the following statements while interrogating Appellant, Juarez:

> ... the first part of the conversation I basically was explaining to him the differences in his statement and his daughter's statement and I couldn't understand why he wasn't just ... I mean he was caught ... why he didn't just come out and get this over with so his daughter ... we could release his daughter and go home. I explained to him that at that particular point I wasn't able to release anyone; that everyone that was gonna be charged at this particular time. (R. 156 p. 41 I told him that his daughter was a suspect and that ... that I believed that he knew what was going on and he could ... he would be the only one that could tell me she wasn't involved. (R. 156 p. 61).
> I told him that if she was arrested, the baby would have to be placed into foster care until someone could come up and pick her up. (R. 156 p. 61-62)

In response to questioning by the County Attorney, Trooper Davis testified as follows:

> ... Mr. Juarez realized that what deputy Watson wanted to do was to arrange to have his daughter, Ms. Juarez, booked into jail and have the baby placed in a foster home at the time. At that point he decided to go ahead and cooperate and advise us of the ... of what he was doing, as far as the transaction with the narcotics. (R. 156 p. 86)

In response to Mr. Scarth's question about the number of times in both interviews any officer stated to Mr. Juarez something to the effect of: Come clean. Tell us what's going on, Trooper Davis made the following replies:

> Numerous times I'd say probably three of four times per interview, so roughly up to about 10. Dan Watson did tell Mr. Juarez that if he couldn't get to the bottom of it, his daughter would have to be booked. (R. 156 p. 97)

Until Deputy Watson left the interrogation room to remove the child from

its mother, Defendant Juarez had denied all knowledge of the presence of marijuana. (R. 156 p. 98, 113). It was only after Deputy Watson removed the child from its mother that Defendant Juarez stated, "Okay, I'll take the blame for it." (R. 156 p. 99) The foregoing coercive language combined with the act of actually removing the child from the mother, induced Mr. Juarez to talk when he otherwise would not have done so. In light of the manner of interrogation utilized by the officers and under the totality of the circumstances, the court should sustain Appellant's Motion to Suppress any and all statements, admissions, and/or confessions, made by Defendant.

CONCLUSION

Based on Deputy Watson's reason for the initial stop, a routine traffic offense, the encounter should have concluded with the Deputy issuing a citation and releasing the vehicle, and its occupants, to continue on their way. Deputy Watson, by his own testimony, confirms the fact he had no particular or articulable facts, no articulable reasonable suspicions, and no requisite probable cause, to command the dog to search the vehicle, and he did not seek consent from the Appellant, or his passengers, for the dog to assist in the search. Utah case law supports that an officer assisted by a narcotics dog looking for drugs, constitutes a search, thus, without consent or probable cause, such a search does not fall within the automobile exception to Art. I, Section 14 of the Utah

Constitution. *See, State v. Robinson,* 797 P.2d 431 (Utah App. 1990), *State v. Larrocco,* 794 P.2d 460, 470 (Utah 1990).

Deputy Watson conducted an illegal search of Appellant's vehicle and this alone is ground for the Court to suppress all the evidence obtained by the officers, including that found under the bed-liner of the defendant's pickup truck.

The State has failed to prove, by a preponderance of the evidence, that statements, admissions, and/or confessions, made by Appellant, were obtained in accordance with principles espoused in *Miranda,* and that the Appellant voluntarily, knowingly and intelligently waived his *Miranda* rights. There is circumstantial evidence and direct testimony that indicates the confession was obtained through coercion and Appellant's ignorance of his fundamental rights.

The Appellant could not speak or understand English. (R. 156 p. 20 ll. 1-2). The translation by Trooper Davis as the interpreter is problematic. (R. 65 para 3) Appellant Juarez's question regarding the purpose of a lawyer (R. 156 p. 101 ll. 13-18, 22-24) is liable to judicial inquiry. The State has produced no evidence, other than the statements of the interrogating officers, that Appellant understood and waived the rights afforded him under *Miranda,* the Fifth Amendment and the Due Process Clause of the U.S. Constitution and the Constitution of the State of Utah. In spite of the fact that they had recording equipment available to them at all times it was never used until the Appellant started telling them what they wanted to hear. A reasonable person doing translations, who admits to less than 100% fluency in the foreign language he is

speaking (R.156 p. 76) would have recorded the entire interrogation including the *Miranda* warning. I would seem incomprehensible that a trained law enforcement officer would not recognize the benefit, even the necessity, of such record keeping.

Additionally, and as a result of failure or refusal to use the technology available, the State has failed to prove by a preponderance of the evidence that the statements, admissions and/or confessions, by Appellant, were obtained in accordance with interrogation methods espoused in *Miranda* and Utah case law. *See, State v. Griffin,* 754 P.2d 965 (Utah 1988). The test of whether a confession is voluntary depends on the totality of the circumstances. *See, State v, Moore,* 697 P.2d 233,236 Utah 1985). There is circumstantial evidence and direct testimony that supports the Appellant's contention that the confessions were obtained through coercive police interrogation techniques and languages designed a manipulate, dominate and nullify Appellant's free and unconstrained choice. Deputy Watson threatened to incarcerate Appellant Juarez's daughter when there was absolutely no evidence that she possessed any knowledge of the marijuana.

He threatened to remove Appellant's infant grandchild to foster care. Deputy Watson's threats, combined with the act of actually removing the infant from the mother, coerced Appellant Juarez to make a confession when he had adamantly denied any knowledge or involvement in criminal activity prior to that time. Improper influences and coercive tactics rendered Appellant Juarez's confession involuntary. Involuntary admissions and confessions violate the

Miranda requirements and the Due Process Clause of the U.S. Constitution and the Constitution of the State of Utah. The burden is on the State to show that evidence obtained following illegal police conduct is attenuated from the illegality.

The State may assert that the statements made by the defendant following his arrest was not the product of constitutionally violative procedures. The Utah Supreme Court has addressed the issue of incriminating statements in light of the Fifth Amendment and the *Miranda* requirements. Specifically, that Court held:

* * *

> The Fifth Amendment "protects individuals from being compelled to give evidence against themselves. . . . Although the United States Supreme Court ... adopted the prophylactic *Miranda* warnings to preserve and reinforce the Fifth Amendment rights of individuals in certain custodial circumstances, those warnings are not themselves constitutionally secured, and a violation of the . . . Fifth Amendment may be found irrespective of whether *Miranda* was breached."

* * *

State v. Piansiaksone, 954 P.2d 861, (865 Utah 1998), quoting *State v. Troyer*, 910 P.2d 1182, 1188 (Utah 1995); see also *Oregon v. Elstad*, 470 U.S. 298, 306 n. 1, 105 S.Ct. 1285, 1292 n. 1(1985).

Therefore, all of the physical evidence together with any and all statements, admissions and/or confessions linking Appellant to any knowledge of the marijuana and involvement in criminal activity should have been suppressed by the Trial Court.

Appellant prays this Court to reverse the Trial Court's decision to deny Appellant's Motion to Suppress.

DATED 30th day of MAY 2000.

JIM R. SCARTH
Attorney for Defendant

CERTIFICATE OF FAXING / MAILING

I HEREBY CERTIFY that TWO full, true, correct COPIES of the above and fore going document was _____ FAXED_____ and (or MAILED) first class mail, postage fully prepaid, this 30th day of MAY, 2000 to: Jan Graham, Attorney General, at: 160 East 300 South 6th Floor, Salt Lake City, UT 84118-0854.

JIM R. SCARTH
Attorney for Appellant

ADDENDUM

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be. searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Utah Code Annotated, 1953 as amended:

Section 77-7-15

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempted to commit a public offense and may demand his name, address and explanation of his actions.

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY

STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. MANUEL DOMINGUEZ JUAREZ, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 961600052 JUDGE K.L. McIFF

THE STATE OF UTAH, Plaintiff, v. ANGEL D. RASCON, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 961600051 JUDGE K.L. McIFF

This matter came before the Court pursuant to Defendants' jointly considered motions to suppress on December 20, 1996. Prior to the hearing, the parties had submitted memoranda of points and authorities. The facts in support of the motions, and

the facts in opposition to the motions, had been set forth in the parties' memoranda, with citations to the transcript of the preliminary hearing. The Court reviewed the parties' memoranda prior to the hearing, and at the hearing, entered the following:

FINDINGS OF FACT

1. On April 20, 1996, Kane County Deputy Dan Watson was on duty and was traveling eastbound on U.S. Highway 89 in Kane County. He stopped the driver of a westbound pickup truck for exceeding the posted speed limit, 68 miles per hour in a 55 mile per hour zone.

2. Mr. Juarez was the registered owner and driver of the truck. Mr. Rascon was a passenger. The truck was also occupied by Mr. Juarez's adult daughter and her infant child.

3. Neither Mr. Juarez nor Mr. Rascon could speak English well, so Ms. Juarez interpreted the communications between them and Deputy Watson at the scene of the stop.

4. Deputy Watson obtained Mr. Juarez's driver license and vehicle registration, and returned to his vehicle to verify the documents through Kane County Dispatch.

5. While waiting for the dispatcher's response, Deputy Watson took his certified narcotics detector dog, Rudi, out of his vehicle. He had no particular reason to take Rudi out, but took Rudi near Defendants' vehicle and commanded her to sniff. Deputy Watson did not ask Defendants' consent, but informed them

of his intentions. Deputy Watson's use of Rudi was consistent with his practice in approximately 70% of his traffic stops, where he, as a matter of routine practice, takes Rudi out of his vehicle and walks her around the stopped vehicle. What he did in this case was consistent with his general practice, and was not something specifically directed to Mr. Juarez's truck to the exclusion of others.

6. Rudi indicated on the driver's side seam of the truck's tailgate. Deputy Watson put Rudi back into his vehicle. Deputy Watson then asked Mr. Juarez, who could not speak English, out of Mr. Juarez's truck. Deputy Watson and Mr. Juarez proceeded to the rear of Mr. Juarez's truck, out of earshot of Ms. Juarez, who could speak and understand English. Deputy Watson then asked Mr. Juarez why Rudi was indicating on the truck.

7. Mr. Juarez opened the tailgate and pulled a suitcase to the back of the tailgate. When he did so, Deputy Watson noticed that double stick tape was used to hold the bed liner to the truck bed, and that the bed liner had pulled away from the truck bed on the driver's side at the rear.

8. Deputy Watson pulled the bed liner slightly away from the truck bed at that spot and used a flashlight to observe packages that appeared to be wrapped in tape.

9. Mr. Juarez threw his hands up and stated in broken English, "Its not my pickup."

10. Deputy Watson called dispatch and requested backup, then examined the space between the bed liner and the truck bed on the passenger's side of the truck, where he observed similarly wrapped packages.

11. Utah Highway Patrol Trooper John Davis, who spoke Spanish, arrived at the scene and placed Mr. Juarez in the back of his patrol vehicle.

12. Both officers removed Mr. Rascon from the passenger side of the truck and handcuffed him. They then removed Ms. Juarez and the infant from the truck and handcuffed her.

13. Kane County Chief Deputy Allen Johnson arrived at the scene and the three adults, the child, and Defendants' truck were taken to the Kane County Jail.

14. In the jail parking lot, the bed liner was removed and 31 packages, weighing a total of 67.31 pounds of what was later determined to be marijuana, were removed from the space between the bed liner and the bed of the truck.

15. At the jail, the three adults were interviewed separately interviewed by the officers. Trooper Davis interpreted during the interviews of Mr. Juarez and Mr. Rascon.

16. At the scene and at the beginning of the interviews at the jail, the three adults were each given the Miranda warning. Each agreed to speak to the officers, and each initially denied any knowledge of the marijuana.

17. The officers interviewed one of the adults, then the next, then the next. Although there were recesses in each adult's interview as the officers moved from one adult to the next, the interviews were continuing interrogations, not subsequent interrogations. The combined interviews lasted approximately two to two and one-half hours.

18. The interviews resulted in differing explanations regarding the ownership of the truck, the purpose of the trip, and whether Mr. Juarez had been in Utah before. Mr. Juarez denied having crossed the United States border or ever having been stopped in a vehicle where marijuana was located. That information was inconsistent with independent information which the officers obtained through law enforcement channels.

19. When the officers came back to visit with Mr. Juarez the final time, they advised him that they were going to have to hold all three adults for further investigation. Until then, Mr. Juarez had denied any responsibility for the marijuana. The officers told Mr. Juarez that they thought he could supply the information as to who was involved, but that in the absence of that information, they would have to hold all three adults.

20. The officers advised Mr. Juarez, as well as Ms. Juarez, that Ms. Juarez would be separated from her child, and the child would be placed in temporary foster care until somebody could come back and pick the child up. Mr. Juarez initially testified that the officers had told him that his daughter would not see

her child again. However, he later acknowledged that the officers had told him that although his daughter and grandchild would be separated, no time frame for the separation was indicated.

21. Ms. Juarez also gave conflicting testimony regarding the separation from her child. On direct examination, she stated that she thought foster care meant for a long time, but in cross-examination, she acknowledged that the officers had told her that the child would be kept only until arrangements could be made for someone for come and get it.

22. Although Ms. Juarez is not a United States citizen, she had lived in Chandler, Arizona for approximately 12 years and had attended grades 1 through 10 in the public school system in Chandler, Arizona. She had therefore been raised in and exposed to a society which would not allow a child to be summarily permanently taken from its parents.

23. The officers did not threaten to take the child away permanently or even for a long time, but rather only until arrangements could be made for someone to pick it up.

24. After Mr. Juarez was advised that all three adults would be held pending further investigation, and that foster care would be arranged for his grandchild, Deputy Watson left that room in order to advise Ms. Juarez that she would be booked.

25. At that time, Deputy Watson took the baby from Ms. Juarez to the dispatching area. Because of the tender age of the

child, it was necessary to make temporary foster care arrangements in order to be able to hold the mother in custody. It was appropriate to advise each of the three adults as to what was transpiring.

26. Whether Mr. Juarez saw Deputy Watson carry the child past the room in which he was being interviewed was not clear from the record. Even if he did, that event was simply what the officers had told him would happen because the child could not remain in the jail with its mother.

27. Mr. Juarez agreed to speak with officers, and confessed that he had agreed to transport the marijuana for the sum of $3,000. He advised that Mr. Rascon had helped him load it, but was not to share in the profit. He assured the officers that his daughter was not involved.

28. Based on Mr. Juarez's statements, Mr. Juarez and Mr. Rascon were held, but his daughter and grandchild were released.

29. Mr. Juarez's decision to tell the truth was not the product of threats, but rather the product of his desire to avoid having his daughter being held in jail and separated from her child, even temporarily, for something she did not do, but that he did. The foundation for him telling the truth was his decision to accept the responsibility, which was rightfully his, rather than have his daughter suffer any adverse consequences. His confession was based on guilt and was reliable.

30. During the second portion of the interview with Mr. Juarez, he had asked the officers what the purpose of a lawyer was. Trooper Davis told Mr. Juarez that lawyers explain the client's rights, tell the client what the laws are, what the client needs to do, and what the client can and can't do, relating to the situation in which the client finds himself.

31. Ms. Juarez and her child were released from jail without being charged.

CONCLUSIONS OF LAW

1. The initial stop of Mr. Juarez's truck was a legitimate stop for speeding.

2. It was reasonable for Deputy Watson to ask for identification from the three adults, all of whom were of Spanish extraction and two of whom did not speak English.

3. It was not unreasonable for Deputy Watson to have Rudi walk around the outside of the truck.

4. Rudi's walk around the truck was not a search of the truck and did not violate the Defendants' Fourth Amendment rights.

5. After Rudi indicated on the rear of the truck, it was reasonable for Deputy Watson to look and inquire further, before sending the Defendants on their way.

6. The cursory examination of the bed liner was a reasonable extension of Deputy Watson's investigation, given that which had preceded it.

7. When Deputy Watson saw the taped brick-like packages, he was justified in continuing the search at the scene and beyond -- which resulted in discovery of the multiple brick-like packages weighing approximately 67 pounds.

8. It would have been unreasonable for Deputy Watson to let the Defendants go during the progress of his investigation.

9. After the packages were located, Deputy Watson was justified in arresting all three adults.

10. Although the timing of Mr. Juarez's confession suggests that he was influenced by the announced intent to hold his daughter pending further investigation, and the knowledge that she would be temporarily separated from her child, that knowledge does not mean that his confession was not voluntary.

11. Each of the adults understood and voluntarily waived their Miranda rights.

12. Mr. Juarez's question about the purpose of a lawyer was insufficient to require officers to stop the interview.

13. Mr. Juarez's confession was voluntary.

DATED this 17 day of ~~August~~ Oct, 1997.

BY THE COURT:

K.L. ~~McIFF~~
District Court Judge

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CERTIFICATE OF SERVICE

I certify that on the 30th day of July, 1997, I served a true and correct unsigned copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to each person or entity listed below:

Jim R. Scarth (via first class mail)
P.O. Box 160
St. George, Utah 84771

Harold J. Dent (via first class mail)
P.O. Box 160
St. George, Utah 84771

Colin Winchester

CERTIFICATE OF SERVICE

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY

STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. MANUEL DOMINGUEZ JUAREZ, Defendant.	ORDER ON MOTION TO SUPPRESS Case No. 961600052 JUDGE K.L. McIFF

THE STATE OF UTAH, Plaintiff, v. ANGEL D. RASCON, Defendant.	ORDER ON MOTION TO SUPPRESS Case No. 961600051 JUDGE K.L. McIFF

This matter came before the Court pursuant to Defendants' jointly considered motions to suppress on December 20, 1996. Prior to the hearing, the parties had submitted memoranda of points and authorities. The facts in support of the motions, and

the facts in opposition to the motions, had been set forth in the parties' memoranda, with citations to the transcript of the preliminary hearing. The Court reviewed the parties' memoranda prior to the hearing, and based thereon, entered its Findings of Fact and Conclusions of Law.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' motions to suppress the evidence are denied.

DATED this 17th day of ~~May,~~ Oct 1997.

BY THE COURT:

K.L. McIFF
District Court Judge

~~CERTIFICATE OF SERVICE~~

I certify that on the 30th day of April, 1997, I served a true and correct unsigned copy of the foregoing ORDER ON MOTION TO SUPPRESS to each person or entity listed below:

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Kanab, Utah 84741

Colin Winchester

CERTIFICATE OF SERVICE

I certify that on the 17th day of ~~May~~ October, 1997, I served a true and correct signed copy of the foregoing ORDER ON MOTION TO SUPPRESS to each person or entity listed below:

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY

STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. MANUEL JUAREZ, Defendant.	JUDGMENT AND SENTENCE Case No. 961600052 ASSIGNED JUDGE: K. L. McIFF

This matter came before the Court for sentencing on May 14, 1999. The State of Utah was represented by the Deputy Kane County Attorney, J. Christian Rasmussen. The Defendant was present and was represented by counsel, Jim R. Scarth. The Court had previously ordered that a pre-sentence investigation report be prepared by the Department of Adult Probation and Parole, and the report was received and reviewed by the parties and counsel

prior to sentencing. The parties made sentencing recommendations.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. SENTENCE. On Count 1, Possession of a Controlled Substance with Intent to Distribute, a Third Degree Felony, Defendant is sentenced and ordered to serve 0 to 5 years in the Utah State Prison, and pay a fine and surcharge in the total amount of $9,250. The term of imprisonment is suspended. The fine and surcharge imposed are suspended except for a total of $2,500.

2. ORDER OF PROBATION. Defendant is placed on unsupervised probation for a period of 36 months, subject to the following terms and conditions:

a. Defendant shall serve one year in the Kane County Jail.

b. Defendant shall pay at least $100 per month toward the fine and surcharge imposed. The first payment shall be due 30 days after Defendant's release from the Kane County Jail, and subsequent payments shall be due on or before the 1st day of each month thereafter until all of the unsuspended portion of the fine and surcharge has been paid in full. Payments shall be made to the Clerk

of the Sixth Judicial District Court, 76 North Main Street, Kanab, Utah 84741.

c. Defendant shall not use, possess, or have control of illegal controlled substances.

d. Defendant shall provide a sample of his breath or bodily fluids, upon the request of any law enforcement officer.

e. Defendant shall submit to a search of his person, residence, vehicle, and other premises under his control, upon the request of any law enforcement officer upon reasonable suspicion, without the necessity of a warrant.

f. Defendant shall maintain full-time employment, full-time education, or a full-time combination of both.

g. Defendant shall not commit any further violation of law.

h. Defendant shall notify the Court if he is arrested for any reason.

i. Defendant shall notify the Court of any changes in his address.

3. CERTIFICATE OF PROBABLE CAUSE. Defendant need not serve any portion of the term of incarceration until after his pending appeal is resolved.

4. RIGHT OF APPEAL. Defendant has 30 days from date hereof in which to move to appeal the sentence of the Court.

DATED this 11 day of June, 1999.

BY THE COURT:

K. L. McIFF
District Court Judge

CERTIFICATE OF SERVICE

I certify that on the 18th day of May 1999, I served a true and correct unsigned copy of the foregoing JUDGMENT AND SENTENCE to each person or entity listed below:

Jim R. Scarth
P. O. Box 160
St. George, UT 84770

(via first class mail)

Mariel P. Budd

CERTIFICATE OF SERVICE

I certify that on the 17th day of June, 1999, I served a true and correct signed copy of the foregoing JUDGMENT AND SENTENCE to each person or entity listed below:

Jim R. Scarth
P. O. Box 160
St. George, UT 84770

(via first class mail)

Kane County Sheriff
76 North Main Street
Kanab, Utah 84741

(via hand delivery)

Utah Highway Patrol
126 East 100 South
Kanab, UT 84741

(via first class mail)

Mariel P. Budd